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**COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re EVAN K., a Person Coming Under the  
Juvenile Court Law.

TULARE COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

D.V.,

Defendant and Appellant.

F064990

(Super. Ct. No. JJV065747)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lang, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Poochigian, J., Detjen, J.

## INTRODUCTION

D.V. (mother) appeals from the juvenile court's orders summarily denying her petition pursuant to Welfare and Institutions Code section 388,<sup>1</sup> finding that the beneficial parent-child relationship exception is inapplicable to her case, and terminating her parental rights to her son, Evan K. We reject mother's contentions and affirm the juvenile court's orders.

## FACTS AND PROCEEDINGS

### *Background*

On October 6, 2011, a social worker with the Tulare County Health and Human Services Agency (agency) was called to detain Evan K., an autistic four-year-old, because mother was being arrested and incarcerated on drug-related charges. Kimberley Miller, who was employed with Bright Futures to provide services to Evan, discovered several marijuana leaves imprinted on a clear plastic baggie on the floor of the bathroom he used. Miller contacted her supervisor who then contacted the police.

When social worker Melissa Hall arrived to mother's residence, mother admitted recently smoking methamphetamine and appeared to Hall to be under the influence of drugs. Hall saw seven or eight pipes commonly used to smoke methamphetamine in a small purse, empty pill capsules, and two prescriptions without a label in the residence. Mother had been arrested on similar charges in 2010 and was on probation. A baggie of methamphetamine was found on the bathroom floor of the child's bathroom.

Mother admitted smoking methamphetamine the day before when her son was at school. Mother claimed that she was in the process of moving and had only relapsed into

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<sup>1</sup> Unless otherwise designated, all statutory references are to the Welfare and Institutions Code.

drug use the week before. Mother claimed she had no idea how drugs came to be in her son's bathroom. Mother asserted she was set up and would beat the charges.

On October 11, 2011, a petition was filed pursuant to section 300 alleging that mother was unable to protect Evan from exposure to controlled substances and drug paraphernalia. The petition stated Evan was autistic and required an alternative care provider and that he was at substantial risk of physical and emotional harm due to his exposure to a detrimental home environment. The petition included an allegation that mother was incarcerated and could not arrange for adequate care for Evan.

At the detention hearing on October 12, 2011, mother appeared with Ted V., Evan's alleged father. The matter was submitted based on the agency's report. The court found there was a prima facie showing that Evan came within section 300 and ordered his detention. The parents were referred for evaluation and services. Although the mother had completed a drug class and a parenting plan as part of her prior criminal case, the juvenile court still ordered a substance abuse referral and left it within the social worker's discretion for further parenting services. Father declined services at that time, deferring services until the disposition hearing. The court ordered that the child would have no visits with mother while she was incarcerated.

### ***Jurisdiction and Disposition Hearings***

Mother pled guilty to criminal allegations in late October 2011 and was scheduled to be sentenced on November 18, 2011. Mother was not eligible for release from jail into a treatment facility. The social worker's jurisdiction/disposition report was prepared in late October 2011. The agency initially recommended that services be provided to mother. On November 3, 2011, the agency filed an addendum report changing its recommendation. The agency stated that mother was showing resistance to court ordered

services and should be denied services pursuant to section 361.5, subdivision (b)(13).<sup>2</sup>

The agency also recommended that father not receive services. Until his detention, Evan missed 24 of 50 days of school with four excused or justified absences.

On November 17, 2011, the parents executed waiver of rights forms and submitted the matter on the social worker's reports. The court found the allegations of the petition true. Mother stipulated to immediate disposition. The court ordered no visits for mother while she remained in custody. Upon her release from custody, mother could have supervised visits twice a week. The child was placed with grandparents who lived outside of California. While the child is living outside California, mother was permitted a two-hour monthly visit supervised by the agency. Mother was permitted telephonic contact with the child.

### ***Section 366.26 Hearing***

The agency's report for the termination hearing was filed on February 22, 2012. The agency reported that Evan's grandparents picked him up in December 2011 and he remained in their custody. The grandparents made a strong commitment to Evan and had been proactive in giving Evan excellent care for his Autism.

Evan is in good health and his greatest challenge is with his communication skills. The grandparents reported to the social worker that Evan's speech was improving and that he was now stringing four and five words together. The grandparents have a very structured routine that they keep with Evan. Both grandparents are involved with his development and try to keep him constantly engaged. Evan is also receiving educational services from his local school district.

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<sup>2</sup> Pursuant to section 361.5, subdivision (b)(13), a court can deny services where a parent or guardian has a history of extensive, abusive, or chronic use of drugs or alcohol and has resisted court-ordered treatment for that problem during a three-year period immediately prior to the filing of the petition or has refused to comply with a drug or alcohol treatment program described in a case plan on at least two prior occasions.

Mother was released from jail in January 2012 and informed the social worker that she wanted to regain custody of her child. Mother and father visited Evan outside California for two hours at the local social services agency in early February 2012. The grandparents reported that the visit went well and Evan left the visit happy and calm.

Evan made great progress in his grandparents' home. They made sure all of his needs were met and they love him very much. Given Evan's age and general good health, the social worker believed there were many foster-adopt families that would be willing to adopt him aside from his grandparents. Adoption was identified as the being in Evan's best interests. The grandparents have a very stable and loving relationship and a beautiful home. The grandparents have stated on numerous occasions that they are fully committed to adopting Evan. The social worker recommended that the parental rights be terminated and adoption chosen as Evan's permanent plan.

The section 366.26 hearing was continued in March and April of 2012 to May 3, 2012. On May 2, 2012, mother filed a section 388 petition seeking custody of Evan and dismissal of the instant action. Alternatively, mother sought Evan's placement with her with family maintenance services, or, increased visitation and reunification services. Mother alleged she had been in compliance with her outpatient treatment program and had three negative drug test results.

The court summarily denied mother's section 388 petition. The court issued a written ruling stating that while mother had made some progress toward addressing her substance abuse problems, she had done so over just more than two months and mother's substance abuse problem was longstanding. The court found that mother's risk of substance abuse in the very early stages of the recovery process remained high.

Mother testified that she married father on February 19, 2012, but was living in California because her probation officer had yet to give her permission to move out of state. For purposes of the beneficial parent-child relationship exception to adoption, the parties stipulated mother visited Evan as regularly as she could given the fact that she

was incarcerated. Mother kept her two-hour per month visitation schedule with Evan outside of California except for the month of April 2012 because of the changes in court dates. Mother also called Evan on the telephone on Saturday mornings.

Mother had taken care of Evan since his birth and he lived with her until her incarceration on October 6, 2011. Mother conceded that when an in-home service provider for autistic children was present, she did not participate with the service provider for a period of three weeks because she was using drugs. Mother communicated with Evan with American Sign Language, which she taught him. Mother described her relationship with Evan as a very tight and extremely strong bond, and that Evan would cry as the social worker would pull him away from her at the end of their visits. Mother testified that she had not used illegal substances in over six months.

The court found mother's testimony to be largely self-serving and that she failed to meet her burden of demonstrating that the beneficial parent-child relationship exception was applicable. The court found that Evan was adoptable and terminated mother's parental rights.

## **DISCUSSION**

### ***Section 388 Petition***

Mother contends the court erred in summarily denying her section 388 petition without conducting a full hearing because she made a prima facie showing that her circumstances had changed. We disagree.

A parent may petition the juvenile court to vacate or modify a previous order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (d); Cal. Rules of Court, rule 5.570; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

A court must liberally construe such a petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)) Section 388 requires, however, that

a petitioner make a prima facie showing of both elements to trigger an evidentiary hearing on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see also *Marilyn H.*, at p. 310.) For instance, if a parent makes a prima facie showing of changed circumstances or new evidence sufficient to satisfy the first prong under section 388, a court may deny a section 388 petition without an evidentiary hearing if the parent does not make a prima facie showing that the relief sought would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

A prima facie showing refers to those facts that will sustain a favorable decision if the evidence submitted in support of the petitioner's allegations is credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) Consequently, section 388 petitions with general, conclusory allegations do not suffice. Otherwise the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*In re Edward H.*, at p. 593.) To obtain a hearing, successful petitions include declarations, certificates or other attachments, which demonstrate the showing the petitioner will make. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.)

The petition executed by mother failed to make a prima facie showing of either changed circumstances or the child's best interests. At most, it included information that mother had enrolled in an outpatient drug rehabilitation program that she was scheduled to complete in May 2012, and three negative drug tests in March and April 2012. Mother's allegations of changed circumstances were otherwise conclusory.<sup>3</sup>

The petition failed to take into account the child's interests on the eve of the section 366.26 hearing. Once reunification efforts have been terminated, the child's

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<sup>3</sup> A showing of changing, rather than changed circumstances, is insufficient to warrant a hearing on a section 388 petition. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072.) Even if mother's allegations in the petition could be construed as changing circumstances, her allegations do not arise to changed circumstances.

interest in stability and permanency is a juvenile court's primary concern, outweighing a parent's interest in reunification. (*Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) Children have a fundamental independent interest in belonging to a family unit and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*Id.* at p. 306.) Here, there was no showing that reopening reunification services for mother would advance the child's interest in stability. The juvenile court did not err in failing to conduct a hearing on mother's section 388 petition.

### ***Parent Benefit Exception***

Mother argues that because of the close relationship she had to her child, the parental benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) should have been applied in this case because terminating her parental rights would be detrimental to the child. We disagree.

Appellate courts have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship that promotes the wellbeing of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents' rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life

that results in a significant, positive, emotional attachment from child to parent. (*Id.* at p. 954.) We review the juvenile court's findings concerning the parental benefit exception under the deferential abuse of discretion standard. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*))

Where the issue on appeal turns on a failure of proof, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. The issue is whether the appellant's evidence was uncontradicted, unimpeached, and of such weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*))

We review the record in the light most favorable to the judgment. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) When a court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion in so doing. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) To conclude there was an abuse of discretion, the proof offered must be uncontradicted and unimpeached so that discretion could be exercised in only one way, compelling a finding in the appellant's favor as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

Mother claims she made a compelling showing that she was bonded with Evan and the parties stipulated she visited him regularly given her incarceration. Mother asserts she had breast fed Evan and taught him to communicate in sign language. In mother's view, her maintenance of a true parent-child relationship with Evan warranted a finding that termination would be detrimental. Mother relies on her reading of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*), to support her claim. (Another authority similar to *S.B.* is *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*)) We are neither factually nor legally persuaded by mother's argument.

Mother had an earlier failed attempt to overcome her drug addiction. Her relapse led to drugs in the bathroom Evan and his caregiver used. Mother did not contest the jurisdiction/disposition findings that she was not entitled to services. She waited until the eve of the termination hearing to assert changed circumstances.

As respondent points out, mother did nothing to establish that she had anything more than a few pleasant, short visits with Evan. Mother also called Evan weekly on the telephone. Although mother asserted that she taught Evan sign language, there was no other corroboration of this in the record. More importantly, with the direct assistance and intervention of his relative caregivers, Evan was able to progress and improve upon his verbal skills.

Although mother obtained some services for Evan prior to his detention, she acknowledged that she was not engaged with the provider of those services as they were given to Evan because of her drug use. It further appears that she failed to be engaged with Evan enough for him to acquire any significant vocabulary and he was capable of learning vocabulary from his new caregivers. It is difficult to conclude from the circumstances in this record that mother's relationship with Evan was beneficial to the extent that the exception to adoption should apply in this case.

Neither *S.B.*, nor *Amber M.*, stand for the proposition that a parent's effort to reunify coupled with regular, pleasant, and affectionate visits, compels a finding that termination would be detrimental to the child. The appellate court, in both cases, did mention the parent's effort as evidence of the parent's devotion to the children. (*S.B.*, *supra*, 164 Cal.App.4th at p. 300; *Amber M.*, *supra*, 103 Cal.App.4th at p. 690.) The parent's effort and devotion, however, was not the linchpin to either decision. Notably, in both cases, there was uncontroverted third-party evidence, including expert opinion, of a strong attachment between the parent and the children and the potential for harm to the children. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 295-296; *Amber M.*, *supra*, 103 Cal.App.4th at pp. 689-690.) In this case, mother presented no such evidence.

As the juvenile court observed, there is little doubt mother loves Evan. The parent-child relationship, however, must arise from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life that results in a significant, positive, emotional attachment from child to parent. A parent must also seek help for a child with a condition like Autism rather than to ignore it.

Mother failed to demonstrate at the section 366.26 hearing that she occupied a true parental role with her child that resulted in a significant, positive emotional attachment of the child to her. Mother failed to show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to her case. The juvenile court did not err in failing to apply the parental benefit exception to this case or in terminating mother's parental rights.

#### **DISPOSITION**

The court's orders denying mother's petition pursuant to Welfare and Institutions Code section 388 and terminating her parental rights pursuant to Welfare and Institutions Code section 366.26 are affirmed.